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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

NOV 30 1993

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

PP Docket No. 93-253

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

REPLY COMMENTS OF PALMER COMMUNICATIONS INCORPORATED

Palmer Communications Incorporated ("Palmer"), by its attorneys and pursuant to Rule Section 1.415, submits its reply to the comments submitted on the Commission's proposal to implement competitive bidding to choose from among mutually exclusive applications for initial licenses to provide service to subscribers for compensation, including the personal communications service ("PCS").^{1/} In support, the following is shown:

1. As Palmer indicated in its opening comments, Palmer and its affiliates are diversified communications providers in the broadcast, common carrier and specialized mobile radio services. In addition, Palmer is a majority female owned and controlled company. As such, it is acutely sensitive to the Congressional mandate and the Commission's proposals that the competitive bidding process be structured so as to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women" (collectively "Designated Entities"). NPRM at para. 13. The issues raised by this Congressional mandate were

^{1/} Competitive Bidding, FCC 93-455, 8 FCC Rcd ____ (October 12, 1993) ("NPRM").

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thoroughly debated in the various comments filed by the parties in this proceeding. By and large the comments submitted supported the positions Palmer took in its opening comments. In certain instances, other parties took a position contrary to Palmer's position. As Palmer shows herein, the weight of the evidence presented in this proceeding supports the key positions Palmer advocated in its opening comments. As such, the Commission should adopt those positions in its final order in this proceeding.

2. Palmer's support of the Commission's conclusion to set aside two blocks of PCS spectrum, the 20 MHz Block C, and the 10 MHz Block D, for bidding by the Congressionally Designated Entities and for such preferences for Designated Entities as installment payment plans and the use of tax certificates was almost universally supported below.^{2/} In light of this virtually universal support, there would appear no need for further discussion of these specific issues.

3. Furthermore, Palmer's position, that in certain respects the NPRM does not go far enough in making economic opportunity available to the Designated Entities, and that the Commission should therefore provide preferences to Designated Entities when they apply for other frequency blocks, and that Designated Entities should receive an additional preference item of a bidding credit

^{2/} See, e.g., Comments of Oye Ajayi-Obe; Comments of National Association of Minority Telecommunications Executives & Companies at 14; Comments of NYNEX Corporation at 18.

when they bid for non-set aside frequency blocks, also found strong support in the comments.^{3/}

4. As those and other parties recognized, making meaningful opportunity available for Designated Entities requires more than merely creating two set-aside frequency blocks. This is especially true given the potential large number of Designated Entities, and the fact that neither of the two prime PCS blocks, the 30 MHz A and B blocks, are set aside for Designated Entities. The extension of preference items to non-set-aside blocks would go a long way toward equalizing the historic limitations of Designated Entities in such areas as lack of capital, credit discrimination, etc.^{4/}

5. Furthermore to put real teeth into the Congressional mandate to make opportunities available for Designated Entities the Commission must adopt Palmer's and other parties' recommendation

^{3/} See Comments of Alliance of Rural Area Telephone and Cellular Service Providers at 3; Comments of Corporate Technology Partners at 2-4; Comments of Devsha Corporation at 5; Comments of Iowa Network Services, Inc. at 18; Comments of National Association of Black Owned Broadcasters, Inc. at 9-13; Comments of national Association of Minority Telecommunications Executives & Companies at 14-15; Comments of Rocky Mountain Telecommunications Association & Western Rural Telephone Association at 16-19. Commenters tended to place that bidding preference at 10 percent, although several commenters suggested higher bidding credits up to 50 percent. Id.

^{4/} Significantly, Palmer's suggestion that the Commission relax the constraints placed on cellular providers proposing to offer PCS within their cellular service areas when the cellular provider is a Designated Entity found support among the commenters. See, e.g., Comments of Chickasaw Telephone Company at 4-5. As Palmer previously indicated, this is an important issue because relaxing the cellular/PCS cross-ownership constraint would allow cellular entities which are also Designated Entities to bid on the set-aside 20 MHz C block of frequencies in their service areas, something which the Commission's PCS order would not allow.

for bidding credits. As the various commenters recognized, such credits would lessen the need for access to the enormous sources of capital required by small businesses and minority/female owned applicants to bid on PCS spectrum, and allow these entities more capital to focus on providing service to the public.

6. Despite the clear Congressional intent expressed in the legislation, certain commenters raised issues concerning whether female owned entities should be considered Designated Entities, and others suggested that all Designated Entities must meet the designation of small businesses to receive preferences.^{5/} The Commission should reject these suggestions. It is abundantly clear from their inclusion in the authorizing legislation that Congress intended female owned businesses to merit special consideration because of the economic, legal and social discrimination such entities have historically suffered. See Section 309(j)(4)(D) of the Communications Act of 1934, as amended. Furthermore, it is not appropriate to consider that merely including female owned businesses under the small business category adequately meets Congress's intentions. If that were what Congress intended, it would not have separately delineated several classes of entities, including small businesses and businesses owned by minorities and women, as deserving special consideration.^{6/}

^{5/} See, e.g., Comments of Alliance of Rural Area Telephone and Cellular Providers at 4.

^{6/} Economics and Technology, Inc., at 1-4, seeks to expand the list of Designated Entities to include the handicapped. Unfortunately, Congress did not specify such individuals as
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7. Nor can it be said that Congress's intent is not adequately supported from a Constitutional standpoint to withstand judicial scrutiny. As the comments of various parties show, a more than adequate justification exists to support Congress's inclusion of female owned entities as deserving of special consideration.^{7/} As the American Women in Radio and Television, Inc. point out (at 4-7), numerous studies show a disparity in economic and business opportunity for women. The promotion of equality in this regard is a substantial and legitimate governmental interest.^{8/}

^{6/} (...continued)

Designated Entities. Given the specific Congressional designation of those persons entitled to preferences, it is beyond the Commission's authority to expand that enumeration.

^{7/} See Comments of National Association of Minority Telecommunications Executives & Companies at 7-14; Comments of Call Her at 4, 7-9.

^{8/} As Palmer explained in its opening comments, there is no doubt it is an important governmental objective to foster economic opportunity for minorities and women, and that this is an objective within the power of Congress under both the Commerce Clause and the Fourteenth Amendment to the Constitution. The general lack of minority and female owned businesses, and the specific dearth of such ownership in the communications industry, is well known. Moreover, the Commission's Small Business Advisory Committee's September 15, 1993 Report in the PCS proceeding (at pp. 3-5), found that women and minorities "have encountered special barriers to telecommunications ownership." Indeed, the Report states that women owned firms account for less than two percent of the industry subgroup containing communications firms, and that there were only 11 minority firms engaged in the delivery of cellular, SMR, radio paging, or messaging services in the United States. Id. at 4. The Report further concludes that lack of available financing and the legacy of invidious discrimination are important factors behind the underrepresentation of minority and female communications providers. Id. at 4-5.

Given this clear record, there can be no serious doubt that the selective easing of the financial burdens attendant to
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8. Similarly, calls to tie preferences to Designated Entities to a "local presence" requirement, contained in some of the filed comments,^{2/} lack substantial support, except with respect to the limited case of rural telephone companies. There, and only there, a "local presence" requirement has a sufficient regulatory nexus since such companies generally operate in defined territories, and need access to revenues from PCS operations to help support their local operations. As applied to other Designated Entities, imposing a "local presence" requirement can only discourage participation in PCS by entities who have had too long a history of discouragement. As Call-Her explains (at 7-9), regardless of their size, women-owned businesses have difficulty obtaining access to adequate capital. The problems of entry into capital-intensive industries for women-owned businesses should not therefore be addressed through the same vehicle addressed to the concerns of small businesses. Rather they should be addressed by specific provisions responsive to the barriers such women-owned businesses face in raising capital.

9. In Palmer's opening comments, it expressed its view that Designated Entities should make a sufficient application showing of

^{8/} (...continued)

bidding for PCS spectrum is substantially related to the achievement of the objective of fostering ownership of emerging communications enterprises. Accordingly, there clearly exists both a record to support Congress's mandate, and a close fit between the proposals advanced herein and the Congressional goal to increase economic opportunities for minorities and women.

^{2/} See, e.g., Comments of Liberty Cellular, Inc.

their qualifications, and that the failure to present a sufficient showing of qualifications should subject a winning bidder seeking Designated Entity status to dismissal and loss of any deposits submitted. Two commenters suggested that to prove Designated Entity status, such applicants should submit certifications issued by the state where the business is legally based.^{10/} Palmer is unaware, however, of any state which so closely monitors businesses that it could certify to this Commission as to their ownership. Palmer suggests a more reasonable approach is to place the burden on the applicant to demonstrate its qualifications, or as suggested in the Comments of George E. Murray (at 15), require Designated Entities to submit copies of agreements or documents establishing the relationships between the parties.

10. The subject of holding periods for licenses awarded to Designated Entities also drew considerable comment. In its opening comments, Palmer supported a reasonable holding period for licenses in the set-aside blocks, or in other blocks which are awarded to Designated Entities benefiting from preferences. However, inasmuch as any required holding period tends to result in market distortion and inefficiency, Palmer suggested limiting the required holding period to one year after initial commencement of public service. Palmer explained that such a holding period would ensure that Designated Entities actually construct their systems and place them

^{10/} See Comments of Venus Wireless Inc.; Comments of CFW Communications Company, Denver and Ephrata Telephone and Telegraph Company, and Lexington Telephone Company at 2.

in operation providing public service before transferring them.^{11/} Various parties proposed differing holding periods. Although most parties taking a position suggested there should be no holding period where transfers are made to another Designated Entity, in the case of transfers to non-Designated Entities, the commenters suggested various holding periods.^{12/} In several cases, the suggestion was made to completely prohibit transfers of licenses held by Designated Entities except to other Designated Entities.^{13/}

11. The Commission's goals in establishing a holding period should be to ensure that its procedures are not abused by speculators who have no real intent to provide public service, and to ensure the public receives maximum benefit from a scarce public resource. Locking a licensee into a lengthy holding period does not serve the public interest. As a broadcast licensee of more than 50 years, Palmer has a great deal of experience in observing the effects of lengthy holding periods. In Palmer's view, such periods distort the marketplace by requiring discouraged operators

^{11/} Palmer noted that any required holding period should not serve to limit the ability of Designated Entities to finance construction through public offerings of equity and debt. Accordingly, Palmer suggested that public offerings of less than a 50 percent interest in an entity, or where existing shareholders do not sell stock to the public in an offering, should be exempt from such a holding period.

^{12/} See, e.g., Comments of Cook Inlet Region, Inc. at 49-53 (two years); Comments of Wireless Services Corporation at 4 (five years).

^{13/} See Comments of Bell Atlantic at 17-18; Comments of the Small Telephone Companies of Louisiana.

to continue to hold licenses they do not want to hold and by limiting persons eager and willing to provide better service from obtaining them. A one year holding period after construction, the same rule now applied in the broadcast services where a license is received as the result of a comparative hearing, is adequate to prevent abuse and speculation.

* * *

12. Palmer reiterates its support of the FCC's efforts to expeditiously implement competitive bidding procedures that are equitable and inclusive of all interested and qualified bidders. The comments which have been submitted overwhelmingly support the adoption of reasonable preferences for Designated Entities along the lines Palmer has advocated. Adoption of these preferences will help ensure opportunity for rural telephone companies, small businesses, minorities and women, and encourage the development of PCS throughout the country by a diverse group of qualified applicants.

Respectfully submitted,

PALMER COMMUNICATIONS INCORPORATED

By: 

Gerald S. McGowan
George L. Lyon, Jr.
Its Attorneys

Lukas, McGowan, Nace & Gutierrez, Chartered
1819 H Street, N.W., Seventh Floor
Washington, D.C. 20006
(202) 857-3500

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